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No. 85-1438

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

CHARLOTTE MEMORIAL HOSPITAL AND MEDICAL CENTER, et al.,

Petitioners

v.

WILMA OLIPHANT, et al.,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Statement of the Case

This appeal arises out of two class action proceedings filed on November 2, 1978 and December 19, 1978, which were later consolidated for trial and appeal. Plaintiffs contended that the defendant Charlotte Memorial Hospital engaged in a pattern and practice of discriminating against black nonprofessional employees in certain respects, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., as amended, and 42 U.S.C. §§1981 and 1983. After the trial of this matter in late 1981, and full consideration of thousands of pages of exhibits, testimony and briefs, 1/ the district court rendered extensive findings of fact

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1/ The record on appeal alone consists of 13 fat volumes. These volumes will be referred to herein as "___JApp.___."

and conclusions of law on June 20, 1983.

The district court found that between 1972 and 1981, the Hospital employed approximately 3,500 employees, of whom approximately 38% have been black. The court found that all of the Hospital's management and department heads are and have always been white, and virtually all supervisors and assistant supervisors are and have been white. (Supp.App. 8-9) Although the Hospital has fifty departments, no black employee was assigned to eighteen of the fifty departments as late as 1979. The vast majority of black employees have been segregated to five departments, including housekeeping, janitorial, cafeteria, and central services. Within the five departments, the district court found that black employees are disproportionately assigned to the

lowest paid positions like janitors, cleaners, cafeteria workers, and laborers. The court found that black employees with equal education, length of service, departmental assignment and work schedules were nevertheless paid between $.29 per hour and $.64 per hour less than white employees. (Supp.App. 10)

The district court also found that the Hospital employees numerous techniques which have been criticized for their tendency to mask racial bias. The Hospital fails to post vacancies or advise employees of promotional opportunities. White employees are secretly alerted, selected, and trained to fill openings before blacks are even given an opportunity to bid on them. (Supp.App. 12-13) Supervisors are not provided up-to-date written guidelines for initial job assignments, discipline, or

discharge. Interviewers are instructed to hide lists of available vacancies so that job applicants cannot request specific jobs. Blacks are routinely denied interdepartmental transfers, yet whites are routinely granted such transfers. (Supp.App. 11-13)

The district court also heard evidence on and ruled on numerous individual cases of discrimination, including claims of discriminatory discharge, finding in most instances that the defendant had discriminated against the employees. (Supp.App. 15-51) The district court found that plaintiffs had demonstrated a pattern of discriminatory initial job assignments, denial of interdepartmental transfers and terminations. The district court also rejected some of the individual and class

claims, and revised the class definition to conform to the proof.

In support of the district court's finding that the defendant engaged in a pattern of discriminatory terminations, statistical and anecdotal evidence demonstrated that blacks are discharged at rates ranging from 4.9 to nearly 7 standard deviations from the expected, a result which could have occurred randomly less than 1 in 10,000 times. (5 JApp. 1414-21) The defendant's statistical expert, Dr. Charles Haworth, admitted that "involuntary terminations are associated with race." (7 JApp. 1903-04) Of particular note is the following exchange between the district court and Dr. Haworth:

Q: Do you want to translate that a little more? You say that the statistics, as analyzed by Dr. Parrow [plaintiffs' expert], do show that involuntary terminations are associated with race?

A: Yes. It's not as if there was a random process by which people were involuntarily terminated.

(7 JApp. 1903-04)

The defendant did not offer any statistical, anecdotal or documentary evidence purporting to explain the enormous discrepancy between white and black terminations, and the district court concluded that plaintiffs had demonstrated a pattern of discriminatory discharges.

The Court of Appeals substantially affirmed. With respect to the evidence as to terminations, the court concluded that

the Hospital had "failed to point to any ... evidence in the record" which purported to explain the disparity in the termination rates. (App. at 19a) In its petition for rehearing, the defendant again claimed that it had presented such evidence, but the appeals court denied rehearing.

REASONS FOR DENYING THE WRIT

The District Court's Factual Finding That Petitioner Failed To Introduce Evidence Explaining The Extraordinarily High Minority Discharge Rate Does Not Warrant Review By This Court.

The evidence showed that black employees were terminated at a much higher rate than white employees. That these deviations might have occurred by chance was less than 1 in 10,000. Statisticians

accept as statistically significant deviations of 2 or greater. (5 JApp. 1414, 1416-18) Plaintiffs' expert, credited by the district court, concluded that race was a factor in the extraordinary black termination rate. (5 JApp. 1414-1421) Even defendant's expert conceded that the extraordinary termination differential suffered by black employees is "associated with race". The district court found that plaintiffs had demonstrated a pattern of racially discriminatory discharges.

The defendant does not challenge this conclusion. (Pet. 14) Rather, the single question presented by the Petition is whether both the district court and the court of appeals erred in finding that defendant failed to offer evidence explaining or rebutting this enormous disparity in discharge rates.

In essence, defendant is asking this Court to review the entire record to determine whether this single factual finding is supported. Defendant does not challenge the accuracy of scores of other findings. Moreover, defendant's arguments on this single finding were carefully considered by both of the lower courts and rejected. The district court found no evidence contradicting a pattern of discrimination. The court of appeals, which invested more than 14 months from the time of oral argument to its October 10, 1985 decision, rejected defendant's contentions in both the initial appeal and in defendant's petition for rehearing. The court of appeals specifically noted that "the Hospital has failed to point to any such evidence in the record." (App. at 19a) This Court should not invest its

limited resources in yet another canvass of the record, particularly where defendant's own expert has conceded that terminations are "associated" with race. "A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (194) and cases cited.

Moreover, the question presented for review is so ambiguous and narrow that its resolution would have no impact beyond the case at hand. The issue presented is merely a factual dispute that has simply been resolved adverse to defendant.

In United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711 (1983), the Court held that courts should focus on

the ultimate issue of discrimination vel non; whether the intermediate, shifting burdens of Burdine [2] have been met are essentially irrelevant to that ultimate issue once the evidence has been taken. Thus, Aikens indicates that the single question presented for review herein -- whether defendant met its intermediate burden of production -- is irrelevant to the ultimate issue of discrimination. In short, even if defendant were correct in its contentions as to what its evidence showed (and it is not), [3] reviewing the

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[2] Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

[3] The Hospital claims that it introduced evidence of the reasons it discharged each minority person, but the record simply does not support this assertions. Defendant's evidence consisted solely of a chart reflecting hypothetical reasons for which an employee might be fired (1 JApp. 145) and a chart merely listing the number of employees

Footnote [3] continued

question would have no bearing on the ultimate question of discrimination.

Under the rule of Anderson v. City of Bessemer City, 470 U.S. 106 (1985), the district court is empowered to weigh evidentiary conflicts and credit plaintiffs' proof. Here, defendant specifically disclaims any challenge to the finding that plaintiffs made out a prima facie case of discriminatory terminations. (Pet. at 14) Since, under Anderson, the district court is entitled to credit plaintiffs' evidence, reviewing the narrow factual question presented herein would not

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3 / (continued)

terminated for various reasons such as absenteeism, insubordination, etc. (13 JApp. 3611-3615) At no point did the defendant attempt to explain why blacks were fired at a rate so much higher than whites. Indeed, the Hospital's expert admitted that race was "associated" with black terminations.

only have no impact on other discrimination cases, it would not change the result in this case.

Conclusion

The two lower courts carefully reviewed the record and ruled for plaintiffs on some matters and for the defendant on others. Both courts below (correctly) determined that petitioner offered no evidence contradicting the compelling pattern of discriminatory discharges. The question presented for review does not warrant review by this Court of thousands of pages of exhibits and testimony. There are no conflicts among the circuits and no legal questions which are even suggested to need resolution by this Court. Accordingly, the petition for a writ of certiorari should be denied.

This 27th day of March, 1986.

Respectfully submitted,

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